INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Regulations involved	2
Statement	4
Argument	11
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Chernekoff v. *United States*, 219 F. 2d 721	13
Eagles v. *Samuels*, 329 U. S. 304	12
Uffelman v. *United States*, No. 14,780, decided January 27, 1956	13, 15–28
United States v. *Davidson*, 218 F. 2d 609	12
United States v. *Dorn*, 121 F. Supp. 171	14
United States v. *Manns*, unreported, decided October 1955, appeal pending C. A. 7	14
United States v. *Mekolichick*, unreported, decided September 29, 1955	14
United States v. *Montee*, 137 F. Supp. 381	14
United States v. *Thoman*, unreported, decided October 1955, appeal pending C. A. 7	14
United States v. *Wenner*, 134 F. Supp. 447	14
Regulations:	
Selective Service Regulations, E. O. 9979, 13 F. R. 4177; 14 F. R. 5021:	
Section 1604.41	2, 11
1604.71	3
Miscellaneous:	
E. O. 10594, 20 F. R. 235	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER, AND REUBEN JONES STEPP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 24–26) is reported at 229 F. 2d 421. The *Wheeler* and *Rowton* opinions of the District Court (R. R. 83–91; W. R. 62–71)[1] are reported at 130 F. Supp. 189; the opinion of the District Court in *Stepp* (S. R. 29–32) has not been reported.

JURISDICTION

The judgments of the Court of Appeals were rendered on January 10, 1956 (Pet. 27) and a

[1] There is a separate record for each case. The symbol "R. R." refers to the *Rowton* record; "W. R.", to *Wheeler;* "S. R.", to *Stepp.* The Court of Appeals opinion covers all three cases.

joint petition for rehearing was denied on March 7, 1956 (Pet. 27). The petition for a writ of certiorari was filed on March 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the failure of the local selective service boards to post a list of advisors to registrants constituted a denial of due process as to these petitioners so as to invalidate their orders to report for civilian work in lieu of induction into the armed forces.

REGULATIONS INVOLVED

The pertinent Selective Service Regulations [E. O. 9979, 13 F. R. 4177, 4179; 14 F. R. 5021] provided:

> § 1604.41 *Appointment and duties.* Advisors to registrants shall[2] be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating

[2] The regulations were changed on January 31, 1955 [E. O. 10594, 20 F. R. 735] from "shall" to "may" in order that appointments would be made only where the community situation demonstrated a need for such advisors. We have been advised that it has been the experience of many State Headquarters that the local board clerk, the Government Appeal Agent, and the local board members have ample time to advise registrants as to their rights and duties and to assist them in filling out questionnaires and other forms.

to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

§ 1604.71 *Appointment and duties.* (a) For each local board a government appeal agent shall be appointed by the President upon recommendation of the Governor.

* * * * *

(c) Each government appeal agent and associate government appeal agent shall, whenever possible, be a person with legal training and experience and shall not be a member of the armed forces or any reserve component thereof.

(d) It shall be the duty of the government appeal agent and in his absence or inability to act or at his direction, the duty of the associate government appeal agent:

(1) To expeditiously examine the records of registrants who have been classified by the local board [2] in order that appeals to the appeal board, when found necessary, may be filed within the time limit specified by the regulations, and to appeal, as prescribed by the regulations, from any classification by a local board which, in his opinion, should be reviewed by the appeal board.

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[2] This phraseology has been modified by E. O. 10594, 20 F. R. 735, to require examination of records brought to the attention of the agent.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered.

(4) To render such assistance to the local board as it may request by advising the members and interpreting for them laws, regulations, and other directives.

(5) To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.

STATEMENT

Separate indictments were returned in 1953 in the United States District Court for the Western District of Kentucky charging petitioners, who had each been classified as I–O (conscientious objectors opposed to non-combatant service), with refusing to accept work at specified hospitals, in lieu of induction (R. R. 3–4; W. R. 3–4; S. R. 4–5). All were tried without a jury,[4] convicted and sentenced to a term of imprisonment for three years (R. R. 92–93; W. R. 71; S. R. 32–33). On appeal, the Court of Appeals affirmed (Pet. 27).

[4] Wheeler's and Rowton's trials were consolidated (R. R. 5; W. R. 5–6).

ROWTON

Rowton, who was born in 1929, filed his selective service questionnaire with his local board in Paducah, Kentucky, in October 1938 (Gov. Ex. 1, R. R. 30–34). He stated that he was not employed, and was a member of Jehovah's Witnesses preparing for the ministry (R. R. 32–33). He claimed to be a conscientious objector opposed to non-combatant service, and in November 1951 was so classified (R. R. 33–34). Form 110 (which informed him of his I–O (conscientious objector) classification and his right of appeal) was mailed to him (R. R. 34).

On December 17, 1951, pursuant to his request, he appeared in person before the local board seeking a ministerial classification (R. R. 35, 37–45). At that time, he was accompanied by a person whom the clerk of the board described to the Chairman as an attorney representing Jehovah's Witnesses (R. R. 20–21).[5] After the hearing, he was retained in the I–O classification and was so notified on Form 110 (R. R. 35). After an appeal, another Form 110, informing him of his I–O classification, was mailed to him in March 1952 (R. R. 35, 45, 46). He was ordered to report for work at a state hospital on October 29, 1952, but he refused (R. R. 49–51, 57).

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[5] In accordance with Section 1624.1 of the Regulations, this man was not permitted to appear with Rowton before the Board as counsel (R. R. 20–21).

In October 1952, Rowton submitted information to the local board that he was licensed to perform marriages as a minister of Jehovah's Witnesses (R. R. 52–53). That information was submitted by the local board to state headquarters which replied that it did not consider the evidence sufficient to warrant a reopening of petitioner's case (R. R. 53–55).

On December 17, 1952, at the local board's direction, Rowton appeared before the board and was advised of the consequences of failure to obey its order, but stated that the order would interfere with his ministerial work. He was allowed to submit additional evidence in support of his position (R. R. 57–62). He was again ordered to report to a state hospital for civilian work in lieu of induction (R. R. 65–66) but refused to accept such employment (R. R. 67).

On January 21, 1953, pursuant to advice from National Headquarters, the local board requested Rowton to designate three types of civilian work he would accept (R. R. 68). He refused to make any choice, saying that any such work would interfere with his ministry (R. R. 69). Another interview with the local board followed at which he maintained his position that any civilian work in lieu of induction would conflict with his ministerial duties (R. R. 69–73).

Upon advice from National Headquarters, the local board considered the evidence which had

been previously submitted by Rowton concerning his authority to perform marriages, and notified him he was retained in class I–O (R. R. 74–78). He was again ordered to report for civilian work at a state hospital in June 1953. He reported but refused to accept employment (R. R. 81–82).

At the trial, Rowton testified that just before the trial, at the instance of their counsel, he and Wheeler went to the local board. Rowton inquired if the board had a bulletin board and was told that it did not (R. R. 14, 18–19). He testified that the board did not have posted anywhere a list of advisors to the registrants, although he was not looking for an advisor (R. R. 18–19). The clerk of the local board testified [with Wheeler's testimony corroborating (W. R. 11)] that petitioners came to the board in February 1954 and merely inquired if anything was posted as to their trials (R. R. 25–26). She also testified that the board had a list of advisors to the registrants, but that the list was not posted since the advisors changed, and she usually advised the registrants verbally, if they requested the names (R. R. 26).

WHEELER

Wheeler, who was born in 1928, was registered with the same local board as Rowton. In his questionnaire, filed in October 1948 (Gov. Ex. 2; W. R. 22–26), he stated he was employed as a

machinist apprentice, and was a student for the ministry of Jehovah's Witnesses (W. R. 23–24). He claimed to be a conscientious objector, was so classified, and was notified on Form 110 (W. R. 26–27).

At his request, he was granted a personal appearance before the local board on December 17, 1951, immediately following Rowton's appearance, at which he too pressed a claim for ministerial exemption (W. R. 9, 29–31). He was retained in class I–O and so notified (W. R. 27). He appealed, was retained in class I–O, and so notified (W. R. 27, 31–32). He was ordered to report for work on October 29, 1952, but he refused (W. R. 32–37).

In December 1952, he appeared before the board at its request and was advised of the consequences of failure to report for work. He stated that the order would interfere with his ministry and was allowed to submit written evidence in support of his position (W. R. 38–43). He was again ordered to report for civilian work, but refused (W. R. 44, 49).

In January 1953, pursuant to advice from National Headquarters, the local board requested Wheeler to designate civilian work he would accept. He refused to do so and maintained his position after an interview with the board (W. R. 52–57). He was once again ordered to report for civilian work at a state hospital in May 1953.

He reported but refused to accept employment (W. R. 58–60).

He testified that, before the trial, he went to the local board with Rowton and Rowton asked if anything was posted about the trial (W. R. 11). The clerk told them there was no bulletin board as there was no need to post bulletins (W. R. 10).

STEPP

Stepp's selective service questionnaire was filed in February 1951, with local board No. 15, Hopkinsville, Kentucky. His file showed the following (Gov. Ex. No. 1, S. R. 14–19):

He was born in 1932 and was regularly employed as a termite exterminator. He stated he was a member of Jehovah's Witnesses preparing for the ministry (S. R. 14, 17) and was conscientiously opposed to war (S. R. 19). He was classified I–O and Form 110 notifying him of that classification was mailed to him (S. R. 20). Following an unsuccessful appeal, he was again classified I–O and so notified (S. R. 20, 24). After a physical examination, he was found acceptable and ordered to report for hospital work in lieu of induction (S. R. 20–21). He appeared before the local board at the appointed time, but failed to report to the hospital for work, as ordered. Subsequently, pursuant to advice from state headquarters, the local board asked him to choose the type of civilian work which he preferred in lieu of induction. He replied that he would not ac-

cept any type. Thereafter, he was interviewed by the local board as to the reasons for his refusal to accept any work, but maintained his position (S. R. 21–22). On September 29, 1953, he was ordered to report on October 9, 1953, at a sanatorium for work in lieu of induction, but he failed to do so (S. R. 23, 24–25, 26).

Stepp testified that, a few weeks prior to the trial, he found no list of advisors posted at the board and that the clerk of the board when asked about advisors said she had never heard of them and asked if he meant the appeal agent. The name of such agent, however, was not posted anywhere and the clerk told him that he was "probably" in Florida (S. R. 11–12, 13).

The chairman of the local board testified that the board does not have a list of advisors, but that the board's appeal agent acts as advisor to the registrants; that the board referred petitioner to the appeal agent; and that petitioner contacted the agent (S. R. 8–10). The record on appeal does not contain the entire trial proceedings, but the District Court said (S. R. 31) that the "record does disclose that he [petitioner] sought and was given the counsel and advice of members of the Jehovah Witnesses. As early as February 15, 1951, he was assisted in the preparation of his Selective Service Classification Questionnaire by Richard P. Ohomers, a company servant of the Hopkinsville Company of Jehovah Witnesses. Amos Glen Freeman, also a company servant,

assisted the defendant in the preparation of his conscientious objector's form."

ARGUMENT

1. Petitioners' sole contention (Pet. 2, 7–23) is that the local boards' failure to post the list of advisors to registrants resulted in a denial of due process invalidating their orders to report for civilian work in lieu of induction.[6] The function of the advisors, as set forth in Regulation 1604.41, *supra*, p. 2, is to "advise and assist registrants in the preparation of questionnaires, and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law." On these records, the failure to post the names of the advisors did not prejudice petitioners since they were fully acquainted with and were given the benefit of every avenue available to them in seeking exemptions from military service; the Court of Appeals explicitly found that there was no prejudice (Pet. 26).

In Rowton's case, he in fact had the advice of his counsel at the time of his first personal appearance before the local board. Since Wheeler came with Rowton to the local board for his personal appearance (see R. R. 9), presumably he too had the benefit of that same advice. In the case of Stepp, the local board chairman specifically

[6] There is no claim that petitioners were improperly classified.

referred him to the appeal agent, whom he contacted (see Statement, *supra*, p. 10). Moreover, each petitioner was notified more than once, when he received his Form 110, "For advice, see your government appeal agent." Petitioners' argument (Supp. Pet. 4) that the appeal agent's function is limited to appeals and not to matters before the local board, is negated by Section 1604.71 of the Selective Service Regulations (*supra*, p. 3), which provides that such agent shall protect the interests of the government and the registrant "in all matters."[7]

As is evidenced by petitioners' testimony that their inquiry concerning the posting of advisors was merely an afterthought, the failure on the part of the local board to post the list of advisors did not affect petitioners in any way in their proceedings before the boards. Accordingly, the deficiency did not render the proceedings before the boards unfair and did not vitiate the orders. See *Eagles* v. *Samuels*, 329 U. S. 304, 312; see also *United States* v. *Davidson*, 218 F. 2d 609 (C. A. 9), where this identical point was raised (reversed and remanded on another point, 349 U. S. 918; conviction reaffirmed, 225 F. 2d 836, certiorari denied, 350 U. S. 887). The failure to post a list of advisors had no more relationship to petitioners' classifications than it would to those of

[7] As noted *supra*, fn. 2, the present regulations do not require advisors.

registrants who accepted their classifications and were inducted without protest.

2. The asserted conflict (Pet. 7) between the decision below and *Chernekoff* v. *United States*, 219 F. 2d 721 (C. A. 9), does not exist since, as shown below, the Ninth Circuit has since held that the failure to post the names of advisors did not invalidate a classification. The Court of Appeals in *Chernekoff*, *id.* at p. 724, said:

> The failure of the local board to comply with the posting of names and advisors as provided by 32 Code Fed. Regs. § 1604.41, *supra*, presents another problem of due process.
>
> It was said in argument that this omission is in consonance with the practice in Los Angeles County. If that be so, we have serious doubt as to the validity of such a practice by the local boards. Suffice it here to observe that this deviation from the regulation was not affected by the action of the appeal board.

In a subsequent decision in *Uffelman* v. *United States*, No. 14,780, decided January 27, 1956, and not yet reported (see Appendix, *infra*, pp. 15–28), the same Court of Appeals, when this identical question was squarely presented to it, said that "the *passing* reference [to this issue] in the *Chernekoff* case does not control here." [Emphasis supplied.] It held in *Uffelman* that the failure to post the names was not prejudicial where, as

here, the evidence showed that the registrant was sufficiently advised by other sources. Similarly, a number of District Courts have held that the failure of the local board to appoint an advisory panel and post their names did not vitiate the proceedings before the boards. *United States* v. *Montee,* 137 F. Supp. 381 (E. D. Wis.); *United States* v. *Wenner,* 134 F. Supp. 447 (M. D. Pa.); *United States* v. *Dorn,* 121 F. Supp. 171 (E. D. Wis.); *United States* v. *Mekolichick,* unreported, decided September 29, 1955 (M. D. Pa.); *United States* v. *Manns* and *United States* v. *Thoman,* unreported, decided October 1955 (N. D. Ill), appeals pending, C. A. 7. The District Court decisions to the contrary cited by petitioners (Pet. 8; Pet. App. D) all involved situations where, unlike that here, the courts found affirmative prejudice to the registrants from the failure to post names.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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Attorneys.

APRIL 1956.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 14780, January 27, 1956

WESLEY LAWRENCE UFFELMAN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MATHEWS, HEALY, and LEMMON, Circuit Judges. LEMMON, Circuit Judge.

Recognition of the privilege of conscientious objection to military service is a statutory grace, not a Constitutional right. While it is true that, implementing this grace, certain procedural safeguards have been established by statute and administrative rule, these safeguards cannot be parlayed into rigid Constitutional guarantees of a "trial" before a draft board.

In *United States* v. *Macintosh,* 1931, 283 U. S. 605, 623, the purely statutory character of this grace was spelled out by the Supreme Court in unequivocal words:

> The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.

When, as here, a draft registrant chooses to be indicted rather than inducted, he can clamor for only limited "rights."

1. *Statement of Facts.*

Since the appellant's legal contentions are related with especial closeness to his particular situation in the instant case, a somewhat detailed summary of the facts will be helpful.

The appellant registered with the Selective Service on September 18, 1948. He filed an eight-page Classification Questionnaire on May 2, 1949, containing, *inter alia,* the following statements:

He was born on February 11, 1930. His "occupation" was that of dairy and beef farmer. (At the time of his trial he testified that he was a hod carrier.) He stated that "I am a student preparing for the ministry under the direction of Jehovah's Witness's (sic) in a theological or divinity school." He did not claim at the time that he was either a regular or an ordained minister. He did not state what classification he should be given, at the place where such answer was invited, but he did state that he was studying "to better learn and qualify for ministry." He was single and was working forty hours a week as a farmer.

He further stated that "I am attending the Kingdom Hall of Jehovah's Witness's (sic) located at 2964- 24 street Sacramento, California." He asserted that he was a conscientious objector, and was sent the four-page Special Form for Conscientious Objectors on June 27, 1949, which he completed and returned on July 1, 1949.

On August 16, 1950, the appellant was placed into Class IV–E, at that time the classification

for the "complete" conscientious objector registrant. That classification entailed no burden or obligation that would take the appellant from his "then part-time ministry," hence he did not appeal.

On November 14, 1951, the appellant was reclassified into I–A by the Local Board. On December 11, 1951, he appeared before the Local Board and, in a statement dated December 10, 1951, claimed, *admittedly for the first time,* that he should have the IV–D minister's classification because he had become a "pioneer," or "full-time," minister. The Local Board kept him in Class I–A, and on December 20, 1951, he took an appeal. His complete file was forwarded to the appeal board on January 8, 1952.

The appellant's case was referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objections, pursuant to Sec. 6 (j) of the Universal Military Training and Service Act (50 App. USCA Sec. 456 (j)). A hearing was held on April 8, 1952.

On July 8, 1952, T. Oscar Smith, Special Assistant to the Attorney General, recommended that the appellant's claim of conscientious objection be sustained. The Appeal Board classified the appellant in Class I–O, on July 18, 1952. At that time, the designation for a complete conscientious objector classification had been changed from IV–E to I–O.

He appealed his classification of I–O to the Presidential Appeal Board on March 17, 1953, but was put back into Class I–A by that body, on June 3, 1953.

On June 25, 1953, the appellant was ordered to report for induction, and on July 8, 1953, he refused to submit thereto.

On July 29, 1953, he was indicted, and October 23, 1953, he was acquitted of violating the Universal Military Training and Service Act.

On November 13, 1953, the appellant was reclassified in I–O. On November 19, 1953, he asked for a personal appearance before the Local Board, and he was granted such an interview on December 8, 1953. He submitted various letters and other material to support his position that he was a minister of religion. Included in that material were letters from Homer L. Hendrickson, presiding minister of the South Unit of the Sacramento Jehovah's Witnesses; Alex Uffelman, assistant presiding minister; Paul R. Halbert, Bible study servant; and Albert O. Brese. The first-named three persons signed jointly. Brese stated that the appellant was connected with "the Bible and ministerial work of Jehovah's Witnesses."

At the trial, the appellant testified that he brought Hendrickson and Brese with him to the Local Board on the occasion of his personal interview; that he asked the Board whether he might "invite them in and give testimony"; and that "they weren't allowed to come in."

The Local Board continued the appellant in Class I–O on December 10, 1953, and on January 7, 1954, the appellant was likewise classified as I–O by the Appeal Board. At that time and at the time of the trial, the appellant's position in his church was that of "advertising servant," his duty being to "take care of the magazine."

On March 9, 1954, the appellant had another personal appearance before the Local Board, at which time he stated that his work was that of a hod carrier. On April 16, 1954, the Local Board ordered the appellant to report on April 27, 1954, for institutional work at the Los Angeles County Department of Charities. It was stipulated at the trial that, although ordered to report, the appellant did not do so.

On January 19, 1955, the appellant was indicted for failure to comply with the order of his Local Board. Trial by jury was waived.

At the trial, Mrs. Lillian Z. Searle, clerk of Local Board No. 23 who was called as a witness by the appellant, was asked whether any advisers were appointed by the Board during her tenure, which commenced about January, 1952.

> Well, the Board members always act as advisors. The coordinator acts as an advisor. And there is an appeal agent that acts as an advisor. * * *

In answer to a question by the Court, Mrs. Searle stated that no "specific person otherwise" had been appointed "Advisor to Registrants."

On cross-examination, Mrs. Searle testified that the names, addresses, and telephone numbers of the Board members and of the appeal agent were placed on top of her desk; that the appellant had "never been refused any personal appearance"; that she knew of no case in which, having been "retained in a classification by a personal appearance," he had not taken an appeal; and that he had submitted material for inclusion in his file on "many occasion," and that no one had ever

refused him the opportunity to submit such material.

Colonel George R. Ferrill, described in the record as "an official of the California Selective Service System," when called as a witness for the appellant, testified on cross-examination that in California a Government appeal agent must be an attorney. His testimony on the subject of "Advisors to Registrants" was substantially the same as that of Mrs. Searle.

The appellant testified that during his classification period he had consulted from time to time with Hagen (sic) C. Covington, of New York, counsel for Jehovah's Witnesses, described in the appellee's brief as "probably the outstanding authority on Selective Service today." The appellant consulted with Mr. Covington on "that last classification" which he received—presumably the one under which he refused to be inducted and was convicted instead. Hayden C. Covington is named as counsel in eight of the cases cited in the present opinion. We have no doubt that he is the attorney referred to by the appellant.

The District Court adjudged the appellant guilty, and sentenced him to imprisonment for one year and one day. From that judgment, the present appeal has been taken.

2. *The Questions Presented.*

1. Is the failure to post the names and addresses of "Advisers[1] to Registrants" a denial of due process?

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[1] The spelling "adviser" is preferred by Webster's New International Dictionary, Second Edition (1955).

2. Is a registrant deprived of due process when, although there has been one "inquiry and hearing" by the Department of Justice, there has not been a second such "inquiry and hearing" in the case of the same registrant, who was acquitted in the first case, and who, in the second processing, is classified as a conscientious objector?

3. Was the Local Board's refusal to hear two witnesses offered by the appellant a denial of due process?

3. *The Lack of a Formally Designated "Adviser to Registrants" Did Not Amount to a Denial of Procedural Due Process.*

Section 1604.41 of Title 32 of the Code of Federal Regulations, compiled as of December 31, 1951, and effective as to facts arising on or after January 1, 1952, reads as follows:

> Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

In the Revision of Title 32 covering regulations published on or before December 31, 1954, "effective as to facts arising on and after Janu-

ary 1, 1955," and therefore not applicable here, the mandatory word "shall" in the first line has been changed to the permissive "may." This recent amendment to the Code of Federal Regulations does not seem to have been noticed by counsel, since E. O. No. 10594, incorporating a similar amendment, and cited by the appellant, changed Sec. 1604.41, according to counsel, on January 31, 1955, or thirty days *after* the effective date of the 1954 revision referred to above.

As we have seen, both Mrs. Searle and Colonel Ferrill agreed that no "Advisor to Registrants" had been appointed under the present Act. They also agreed, however, that members of the Board, the clerk of the Board, the coordinator, and the appeal agent act as advisers. Furthermore, the evidence shows that the appellant was constantly advised by Mr. Covington, one of the nation's leading authorities on the Selective Service law.

The appellant relies heavily upon our opinion in *Chernekoff* v. *United States,* 9 Cir., 1955, 219 F. 2d 721, 722, 724, in which we expressed "serious doubt" as to the "validity" of the "practice" of local boards in Los Angeles County, California, in failing to post the names of advisers, and stated that such failure "presents another problem of due process." But the passing reference in the *Chernekoff* case does not control here. There no showing was made that the registrant had available the battery of "advisers" that were ready to assist the appellant in the instant case. Counsel in the instant case agreed that the "label" given to such advisers is not important, so long as the registrant is assured of ready and

sound advice. The record here establishes beyond cavil that the appellant was so assured.

In *Eagles* v. *Samuels*, 1946, 329 U. S. 304, 312, a Selective Service case, the Court said:

> If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair (Case cited), or that there was no evidence to support the order (Case cited), the inquiry is at an end.

This Court, in another Selective Service case, adhered to the principle "that procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox* v. *United States*, 9 Cir., 1952, 200 F. 2d 398, 401.[2]

Since no prejudice is shown to have resulted from the Local Board's failure to have the Director of Selective Service to appoint "advisers to registrants" and its consequent failure to post the names of such advisers in its office, we hold that there is no merit to this first "question" presented by the appellant.

4. *The Appellant Was Not Deprived of Due Process by Not Being Given A Second Department of Justice Hearing.*

As we have seen, the appellant's case was referred to the Department of Justice for inquiry and hearing during the course of the proceedings in his first case, which resulted in his acquittal.

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[2] See also *Martin* v. *United States*, 4 Cir., 1951, 190 F. 2d 775, certiorari denied, 1951, 342 U. S. 872; *United States* v. *De Lime III*, 3 Cir., 1955, 223 F. 2d 96, 101; *United States ex rel McCarthy* v. *Cook*, 3 Cir., 1955, 225 F. 2d 71, 73.

The appellant concedes, as indeed he must, that "The file shows that in the eight months between his reclassification by the local board and his reclassification by the appeal board, the FBI investigated his current status, a Hearing Officer of the Department of Justice *interviewed him at length* and the Attorney General made a recommendation, based on the foregoing, to the appeal board." [Emphasis supplied.] The Attorney General's recommendation was that the appellant's claim of conscientious objection should be sustained, and, as already noted, the Appeal Board followed the recommendation and classified the appellant in I–O, on July 18, 1952.

The appellant complains, however, that "In 1953, when appellant was given another administrative appeal (from the December (November) 10, 1953, notice that he was retained in the undesired I–O classification) he *was not* given the 'special appellate procedures' to aid in determining his current status but was promptly reclassified in the same Class I–O by the appeal board on January __, 1954."

The appellant relies heavily upon the case of *Sterrett* v. *United States,* 9 Cir., 1954, 216 F. 2d 659, 663–665, which has been followed by this Court in *Blevins* v. *United States,* 9 Cir., 1954, 217 F. 2d 506, 508–509, and in *Shepherd* v. *United States,* 9 Cir., 1954, 217 F. 2d 942, 946. The *Sterrett* case, however, can be distinguished on its facts from the one at bar. In *Sterrett,* the Department of Justice returned the registrant's files to the Appeal Board without conducting a hearing because it construed Section 6 (j) of the Universal Military Training and Service Act, as

amended, 50 USCA App. Sec. 456 (j), to mean that the Department could assume jurisdiction only "if such claim *is not sustained* by the local (draft) board. * * * 216 F. 2d at page 662. The opinion thus summarized the Government's position:

> Says the Government: the appellant whose claim had been sustained by the local board, was not appealing *for* a conscientious objector classification but appealing *from* a conscientious objector classification for in each of these cases the registrant was claiming classification as a minister entitled to be classified in Class IV–D. (Page 662.)

In *Sterrett,* the Court stated the two appellants' position as follows:

> Appellant (sic) urges therefore that the words in Sec. 6 (j) reading: "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing," must be construed to mean that whenever an appeal presents the conscientious objection question to the appeal board, it must refer the claim to the Department of Justice.

This Court concluded its opinion in the following language:

> In view of what we here hold not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute. (Page 665.)

The judgments in the two cases were reversed.

In the instant case, however, the appellant, as we have seen, concedes that he was given the full "special appellate procedures" in his first case, in which he was acquitted. He even carefully spells out the various steps in the Department's investigation and recommendation. And the appellant likewise concedes that after his acquittal in the first case, he was placed into Class I–O, as a "complete" conscientious objector.

We do not read *Sterrett* to teach that, no matter how many appeals a registrant may choose to take, even, as here, from a *favorable* action by the Local Board, he may demand, as of right, a succession of Departmental hearings, *ad infinitum*. Not even Jehovah's Witnesses should be permitted to monopolize the time and efforts of the Department of Justice!

5. *The Appellant's Statutory or Constitutional Rights Were Not Violated by the Local Board's Refusal to Hear His Witnesses.*

The appellant testified that two of his prospective witnesses before the Local Board "weren't allowed to come in." Although the appellee suggests that the record on this point is "somewhat ambiguous," the appellant's statement just quoted was not contradicted, and for the purposes of this appeal we accept it as true.

Nevertheless, a refusal by a Local Board to hear a registrant's proffered witnesses is not a violation of his Constitutional or statutory rights. Proceedings before a Selective Service Board are not a trial. In *United States* v. *Nugent*, 1953, 346 U. S. 1, 8, Mr. Chief Justice Vinson said:

> The registrant must first look to his local board for the relief he claims; he must convince this body—composed of representatives of his community—of the depth and sincerity of his convictions. He must fill out forms, calculated to put him to the test; he must supply any additional detailed information which may be necessary for a searching investigation of his claim; and if he or his local board demands it, he may appear in person to explain his position to the persons charged with determining its validity.

The last Chief Justice then cited, with apparent approvel, 32 CFR (1949 ed.) part 1624, *the very first section of which* contains the following sentence, conveniently ignored by the appellant:

> 1624.1 *Opportunity to appear in person.*
>
> * * * * *
>
> (b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, *in its discretion,* permit any person to appear before it with or on behalf of a registrant: * * * [Emphasis supplied.]

In his brief, the appellant insists that "It is unquestionable that the regulation gives the registrant, appearing before the local board the right to discuss, point out, etc., etc. Sec. 1623.2 (b) so provides." The section to which the appellant refers, however, deals *exclusively* with the *registrant's* appearance before the board: it in no way relaxes the provision of Section 1624.1, to the effect that "No person other than a registrant shall have the right to appear in person before the local board," etc.

Similarly, the case of *Davis* v. *United States*, 6 Cir., 1952, 199 F. 2d 689, stressed by the appellant, deals *exclusively* with the registrant's right to appear in person before the local draft board, which right, of course, was freely given to the present appellant. The matter of a registrant's *producing witnesses before the board* is not mentioned in *Davis*, and the case is therefore not in point.

The two "mature" men whom the appellant offered as witnesses were Hendrickson and Brese. As we have seen, however, both these men, together with others, had written letters in the appellant's behalf, which unsworn statements had been submitted to the Local Board. Such unsworn statements could be and were considered by the Board. The appellant was therefore not prejudiced by not being permitted to have those men appear before the Board in person.

6. *Conclusion.*

After a careful examination of the transcript of the trial in the court below and a minute scrutiny of the voluminous exhibits presented to the Local Board and the Appeal Board, we are of the opinion that all the appellant's Constitutional, statutory, and administrative rights have been duly safeguarded.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Jan. 27, 1956.

PAUL P. O'BRIEN, *Clerk.*

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER and REUBEN JONES STEPP, Petitioners

v.

UNITED STATES OF AMERICA

ON JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Authorities Cited

	PAGE
Rules of the United States Court of Appeals for the Sixth Circuit	2
Uffelman v. United States 230 F. 2d 297 (9th Cir., 1956)	7
United States Constitution, Amendment VI	6

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MAY IT PLEASE THE COURT:

The brief of the United States in opposition will be responded to *seriatim.*

I.

The suggestion in footnote 2 on page 2 of the brief for the United States that clerks, appeal agents and local board members "have ample time to advise registrants" is a factual statement entirely out of the record. There is no such proof in any of these records, and even if there were such proof it would not be adequate to overcome the specific mandate of the regulations fixing the responsibility for the help of

registrants, not on the clerk, the appeal agent or the board members, but upon the local board advisors.

II.

On page 5 in the statement of facts in the Rowton case mention is made of the attorney who accompanied Rowton to the hearing but who was denied the right to enter and assist him. The record in this case shows that Rowton was not allowed to have the assistance of counsel at the hearing. There is no other evidence anywhere in the record that he did receive the assistance of an attorney in the preparation of any of his papers. The first personal appearance was long before the final order to report for induction. It was long after the papers had been prepared by Rowton in 1951. There is no presumption that the attorney that appeared with him at the personal appearance and was denied the right to assist him there helped him with the preparation of his papers about a year or two before. There is a very strong presumption of innocence that the Government failed to overcome. The burden was on the Government to show that the attorney accompanying Rowton helped him prepare his papers. The failure thus to prove that Rowton received such assistance is not equivalent to nullifying the failure to provide the mandatory assistance demanded by the regulations.

III.

On page 10 of the Government's brief the statement is made that the record in the Stepp case does not contain the entire trial proceedings. This statement is inaccurate. The entire typewritten transcript does contain all of the proceedings. Under the rules of the United States Court of Appeals for the Sixth Circuit the appellant is permitted to print an appendix. The Government did not see fit to

print any additional part of the typewritten transcript of the proceedings. It is therefore plain that this statement made by the Government is inaccurate.

IV.

The Government makes the statement on page 11 of its brief that the failure to post the names of advisors did not prejudice petitioners since "they were fully acquainted with and were given the benefit of every avenue available to them." This statement of the Government is entirely unsupported by any proof or testimony. It is pure speculation on the part of the Government and is made solely for the purpose of prejudicing this Court against the petitioners in these cases by suggesting that the petitioners had every help possible for them to receive. There is no such proof of any assistance whatever. The burden of proof was upon the Government to establish that there was harmless error. Once the petitioners establish that the Government failed to comply with the regulations by failing to post the names and addresses of advisors to registrants the responsibility shifted to the Government to prove that the petitioners had every assistance possible in the preparation of their papers. The Government at no time attempted to offer any evidence whatever on this point. There was no cross-examination of the petitioners to establish that they did receive any assistance whatever. This argument made here is entirely speculative and wholly unsupported by any facts or the record. It is a mere assertion by the Government to overcome wholly its failure to discharge the burden of proof put upon it by the proof made by the petitioners that the Government had violated the law in failing to post the names and addresses of the advisors to registrants.

V.

It is stated on page 11 that the Court of Appeals "ex-

plicitly found that there was no prejudice." While this was a holding of the Court of Appeals, it was entirely erroneous, being unsupported by any evidence, the same as is the assertion of the Government in its brief. The holding of the court is unsupported by proof, as is pointed out in the petition for writ of certiorari.

VI.

The Government states on page 11 of the brief that Rowton "had the advice of his counsel at the time of his first personal appearance before the local board." This statement is made contrary to the record. At the time of his first personal appearance before the local board Rowton was denied the assistance of his counsel and this statement made by the Government flies in the face of the record itself. There is absolutely no proof whatever that Rowton had any counsel before his personal appearance. At his personal appearance, even though he engaged counsel, he was denied the assistance of counsel. The burden was upon the Government to prove that he had assistance of counsel at other times and, since the proof showed that he was denied assistance of counsel at the personal appearance and there is no proof that he had assistance of counsel when he was before the board at any other time or when he prepared his papers, it is entirely speculative and contrary to the record to make this assertion.

VII.

It is stated also that Wheeler came with Rowton to the local board and "presumably he too had the benefit of that same advice." What is said above also applies here. Wheeler is, moreover, in a much better position because there is no proof that the attorney that appeared at the board in behalf of Rowton came in behalf of Wheeler. The chairman of the local board said the attorney came in behalf of Rowton. The fact that Rowton had counsel does not mean to say that Wheeler had counsel at the time of

the personal appearance. But, in any event, if Wheeler did have counsel it would have done him no good because he was denied the assistance of counsel at the personal appearance. This statement made by the Government, that Wheeler presumably had the benefit of counsel, flies in the face of the burden placed upon the Government to prove that he did have assistance of counsel. There is a presumption of innocence that is much stronger than any speculative argument that can be made by the Government that Wheeler was assisted by Rowton's counsel.

VIII.

Concerning the argument of the Government that the petitioners, Rowton and Wheeler, were assisted by counsel at the personal appearance, it should be remembered that the Government at no time undertook to discharge the burden of proof placed upon it, to establish that Rowton and Wheeler had the assistance of counsel in the preparation of their papers. The only time the record shows that there was any counsel in the case was when Rowton took the counsel with him to the local board, but such counsel was denied the right to appear with him before the local board as he requested. The Government, having failed entirely to discharge its burden of proof that Rowton and Wheeler were assisted by legal counsel in the preparation of their papers, cannot speculate. Such argument is repelled by the presumption of innocence and the burden of proof upon the Government to prove the elements required beyond a reasonable doubt.

IX.

At the bottom of page 11 and the top of page 12 of its brief the Government argues that Stepp was referred by the chairman to the appeal agent. Then reference is made back to the statement of facts appearing on page 10 of the brief. There it is stated that Stepp was referred to the appeal agent. This is not a correct interpretation of the

facts. The testimony of the chairman was entirely general and related to a distinction between the appeal agent and the advisor to registrants. (See the record in the Stepp case at pages 8-10.) At the top of page 10 the chairman testified that they offered Stepp the services of the appeal agent, but this was not at the time following the classification. (See the recital of the facts made by the petitioner at pages 6-7 of the petition for writ of certiorari.) This conference was after the case had been decided by the appeal board and returned to the local board. At such time it was impossible for Stepp to take an appeal. It is plain therefore that the statement made by the Government in its brief is extremely misleading and contrary to the record.

X.

It is stated by the Government on page 12 that the question presented about the failure to post the names and addresses of advisors to registrants was raised at the trial by the petitioners which was "merely an afterthought." This is true. At the time the petitioners were registrants before the local boards and their cases were being processed in the Selective Service System they were wholly unaware of the right to have assistance of advisors. The first they learned about it was upon the trial and this was just a few days before the trial. It is true it was an afterthought but this certainly does not remove any of the strength of the point presented by the petitioners. If this argument made by the Government had any validity, then it would be impossible for any prisoner who is confined in the penitentiary without representation of counsel in violation of the due process clause and the Sixth Amendment to seek release upon habeas corpus, because in every case when the prisoner discovered it after his incarceration it would be "merely an afterthought." Such name calling by the Government in this case is wholly without merit and ought to be rejected as frivolous.

XI.

It is stated on page 12 that the failure to post names of advisors to registrants did not affect "petitioners in any way in their proceedings before the board." This statement is absolutely incorrect. While perhaps it would not have resulted in a better classification, the fact of the matter is that it was a violation of procedural due process. It is irrelevant that a registrant has no good case when it is shown that there is a denial of procedural due process of law.

XII.

It is also stated again at the bottom of page 12 that the failure to comply with the law "had no more relationship to petitioners' classifications than it would to those of registrants who accepted their classifications and were inducted without protest." (Brief, pp. 12-13) This is entirely irrelevant. There are many cases where registrants have submitted to induction voluntarily but who have been discharged because of a violation of their procedural rights. It is fundamental that, even though a registrant does not have a bona fide claim for exemption, the denial of his procedural rights is grounds for a discharge from the armed forces on a writ of habeas corpus.

XIII.

Uffelman v. *United States*, 230 F. 2d 297 (9th Cir. 1956), cited at the bottom of page 13 and printed as an appendix to the brief for the Government, is not in point. It has been distinguished.—See the petition for writ of certiorari at pages 7-8.

XIV.

The effort to distinguish the cases on page 14 of the Government's brief fails. While the cases there held that

there was prejudice, this does not prove that the law requires a showing of prejudice by the petitioners. When petitioners showed a violation of the regulations, the burden shifted to the Government to prove no prejudice and the Government failed to discharge its burden of proof. Thus the suggestion made at the bottom of page 14 is irrelevant and immaterial.

CONCLUSION

It is respectfully submitted that the joint petition for writ of certiorari should be granted.

Respectfully submitted,

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April, 1956.